



Ernst & Young Tower | 950 Main Avenue, 4th Floor | Cleveland, Ohio 44113 | p: 216 696 4441 | f: 216 696 1618 | zrlaw.com



Stephen S. Zashin
OSBA Certified Specialist in
Labor and Employment Law
ssz@zrlaw.com

November 19, 2018

VIA ECF AND EMAIL (sullivanysdchambers@nysd.uscourts.gov)

Honorable Richard J. Sullivan
United States District Court, Southern District of New York
40 Foley Square, Courtroom 905
New York, NY 10007

**RE: *David Lane Johnson v. National Football League Players Association, et al.*
Case No. 17-cv-05131-RJS**

Dear Judge Sullivan:

Plaintiff David Lane Johnson ("Johnson") requests a pre-motion conference regarding his intention to file a motion under Civil Rule 56(d).¹ Defendant the National Football League Players Association ("NFLPA") moved to dismiss the entirety of Johnson's claims against it. The Court denied the NFLPA's motion to dismiss Johnson's claims under the Labor Management Report and Disclosure Act ("LMRDA"). See Dkt. No. 125. Upon the denial of the NFLPA's motion to dismiss, rather than require the NFLPA to answer Johnson's Amended Complaint per Civil Rule 12(a)(4)(A), the Court permitted the NFLPA to file a motion for summary judgment. Dkt. No. 131. The Court also denied Johnson's request for discovery. Dkt. No. 131. To date, the Court has permitted Johnson no discovery.

The NFLPA filed its Motion for Summary Judgment (Dkt. Nos. 134-139) seeking only the dismissal of Johnson's LMRDA claim under 29 U.S.C. § 414, which relates to the NFLPA's refusal to provide Johnson a complete copy of a collective bargaining agreement governing his employment (the "2015 Policy"). However, Johnson's claims under the LMRDA are not limited to 29 U.S.C. § 414. His Amended Complaint clearly makes additional claims against the NFLPA for "disciplin[ing] or retaliat[ing] against Johnson for asserting his rights under the LMRDA." Johnson added these specific claims to his Amended Complaint, and the LMRDA prohibits said actions under 29 U.S.C. §§ 411, 412, and 609.

While the Court permitted the NFLPA to avoid answering numerous averments Johnson added to his Amended Complaint related to his LMRDA claim (see, e.g., Dkt. No. 39 at ¶¶ 287(a)-(d), 307, 311, 312, 314), the NFLPA cannot rewrite Johnson's Amended Complaint to remove these claims. To date, Johnson

¹ The NFLPA declined Johnson's request to withdraw or stay its Motion for Summary Judgment until such time as Johnson could obtain discovery relevant to his remaining claims and stated it would oppose Johnson's request for discovery under Civil Rule 56(d).

November 19, 2018

Page 2

has not needed to address these claims, because the NFLPA has not sought their dismissal. However, any motion filed by Johnson under Civil Rule 56(d) must consider the facts underlying the totality of his LMRDA claims and not just those the NFLPA raises. An overview of Johnson's anticipated motion follows.

Where a nonmovant subject to a motion for summary judgment shows that it is unable to present facts to oppose the motion, the Court may: "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). Johnson intends to ask the Court to deny the NFLPA's Motion for Summary Judgment and permit him discovery prior to opposing it.

To succeed on a motion under Civil Rule 56(d), Johnson must show:

- (1) what facts are sought and how they are to be obtained;
- (2) how these facts are reasonably expected to raise a genuine issue of material fact;
- (3) what efforts the affiant has made to obtain them; and
- (4) why the affiant's efforts were unsuccessful.

Gualandi v. Adams, 385 F.3d 236, 244 (2nd Cir. 2004). Johnson has made numerous attempts to obtain discovery. He issued written discovery to the Defendants, issued subpoenas to third parties, and repeatedly petitioned the Court for discovery. The Court denied Johnson's requests and otherwise stayed all discovery, despite the NFLPA previously agreeing that discovery at this stage of the litigation would be appropriate. See Dkt. No. 85 at 4 ("If...the NFLPA's planned motion to dismiss were denied, and Johnson was in turn permitted to pursue his DFR **or LMRDA** claims against the NFLPA, only then would any discovery become appropriate")(emphasis added); see also Dkt. No. 93 at 1-4 (NFLPA agreeable to exchanging initial disclosures, and, if Johnson's claims survived the NFLPA's motion to dismiss, the NFLPA requested a 120-day discovery period, including written discovery and depositions).

Even if the Court were to conclude that the NFLPA could moot Johnson's claim under 29 U.S.C. § 414 by providing him a complete copy of the 2015 Policy (a conclusion Johnson refutes), whether the NFLPA has done so is a question of fact. Questions of fact also exist as to why the NFLPA repeatedly refused to provide Johnson a complete copy of the 2015 Policy when he requested it in 2016 to ascertain his rights and why the NFLPA otherwise retaliated against him (e.g., was it because he asserted his rights under the LMRDA, was it because he made public statements against the NFLPA).

Heather McPhee's declaration in support of the NFLPA's Motion for Summary Judgment (Dkt. No. 139), in which she states she does not "believe" there were any "oral agreements between the NFLPA and the NFL to modify the [applicable collective bargaining agreement]", is hardly conclusive or definitive and leaves open the possibility that such agreements exist. Furthermore, as detailed in Dkt. No. 129, Ms. McPhee's belief there were no oral agreements conflicts with prior statements the NFLPA's counsel in this matter made to the United States District Court for the Northern District of Ohio:

The parties to the CBA—the NFL and the NFLPA—mutually consented to modify their agreement and not appoint a third arbitrator because there are simply not enough appeal hearings under the Policy to justify having three arbitrators in rotation.



November 19, 2018

Page 3

See Dkt. No. 129 at Ex. 2. In that matter, the NFLPA's counsel further stated he was unsure whether the referenced **modification was oral or in writing**. See Dkt. No. 129 at Ex. 3. The NFLPA's prior statements also conflict with its current position that there was no modification, including Stephen Saxon's declaration. See Dkt. No. 135 at 9; Dkt. No. 138 at ¶ 5. Discovery is necessary to test these conflicts.

In addition to these obvious conflicts in the NFLPA's statements to two separate courts, Ms. McPhee's credibility and Mr. Saxon's credibility are squarely at issue. Johnson is entitled to test their credibility via discovery. See *Arnstein v. Porter*, 154 F.2d 464, 469-70 (2nd Cir. 1946). The declarations of Ms. McPhee and Mr. Saxon also are devoid of any explanation as to how they know no other amendments to the 2015 Policy exist. Again, these declarations are hardly conclusive or definitive.

As detailed in Dkt. No. 129 and Johnson's Amended Complaint, there are a number of other unexplained modifications, deviations, and amendments to the 2015 Policy. For example, the NFLPA continues to reference an amendment to the 2014 policy -- not the 2015 Policy -- regarding the Chief Forensic Toxicologist. Johnson has noted this 2014/2015 discrepancy in multiple filings, but the NFLPA still has not explained it.

Further, the 2015 Policy states players can challenge whether the test "was conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory (herein collectively 'the Collection Procedures')." Despite numerous requests for the Collection Procedures, the NFLPA has never provided them. These documents are part of the 2015 Policy, and the LMRDA requires their production. To date, Mr. Johnson has never received the Collection Procedures and he is entitled to take discovery on whether they exist and whether the NFLPA continues to withhold them from him.

As to the purported two-year period for testing, if it is true that Dr. Lombardo is responsible for applying and designating the testing period, an agreement (oral or written) should exist reflecting this responsibility. Dr. Lombardo also testified that he presented to the Defendants the manner in which he would apply the testing period. Yet, when asked by Johnson, the NFLPA could not explain how the two-year period worked, failed to provide Johnson any information from Dr. Lombardo, and indicated no such agreement existed. These are factual issues that require discovery. So too are the reasons the NFLPA refused to timely provide Johnson amendments to the 2015 Policy, which speak to his claim for punitive damages. Not once has the NFLPA offered an explanation for its lengthy delay.

To rebut the NFLPA's Motion for Summary Judgment, Johnson seeks discovery as to the totality of his LMRDA claims, including: written discovery of Defendants; depositions of Ms. McPhee, NFLPA employee Todd Flanagan, Mr. Saxon, NFL employee Kevin Manara, Dr. Lombardo, and representatives of Defendants under Civil Rule 30(b)(6); and subpoenas to the testing laboratories and Dr. Lombardo. Absent an opportunity for discovery of information strictly within the NFLPA's knowledge and potentially favorable to Johnson, summary judgment is inappropriate. See *Quinn v. Syracuse Model*, 613 F.2d 436, 445 (2nd Cir. 1980) ("when the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted when he is denied reasonable access to potentially favorable information").

Respectfully submitted,

/s/ Stephen S. Zashin

Stephen S. Zashin

